

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEVEN JUDKINS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 95-100-B
)	
SHIRLEY S. CHATER,)	
Commissioner of Social Security,)	
)	
<i>Defendant</i> ¹)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner’s

¹ Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Although this suit was commenced on May 17, 1995, such substitution is also ordered here, and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on March 18, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

determination that the plaintiff has the residual functional capacity (“RFC”) to perform the full range of sedentary work. I recommend that the court affirm the decision of the Commissioner.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since May 10, 1987, Finding 2, Record p. 200; that he has degenerative disc disease at the L-4/L-5 level of his spine, an impairment which is severe but does not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 200; that his statements concerning his impairment and its impact on his ability to work are not entirely credible in light of his own description of his activities and life style, the degree of medical treatment required, the findings made on examination, and discrepancies between his assertions and information contained in the documentary reports, Finding 4, Record p. 200; that he retains the RFC to perform the full range of sedentary work, Finding 5, Record p. 200; that he can no longer perform his past relevant work as a painter, Finding 6, p. 200; and that, based on an exertional capacity for sedentary work, his age (twenty-nine on May 10, 1987), education (limited) and vocational background (semi-skilled), application of Rule 201.25 of Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”), directs a conclusion that the plaintiff was not disabled at any time prior to the Administrative Law Judge’s decision on January 26, 1995, Findings 7-11, Record p. 200. The Appeals Council declined to assume jurisdiction, Record p. 181, making the decision the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

First Administrative Hearing

This case's procedural history frames the narrow issue before the court. This is the plaintiff's second appeal in connection with his application for SSI and SSD benefits. His first appeal, *Judkins v. Shalala*, Civ. No. 93-48-B (D. Me. Nov. 3, 1993), arose from the Commissioner's (then the Secretary) determination that he was not disabled. At the hearing preceding that determination, the Administrative Law Judge found that the plaintiff's allegations of functional limitation were "unsupported by objective medical data." Record p. 23.³ Neurological surgeon Carl W. Irwin, M.D., conducted a consultative examination of the plaintiff on October 2, 1991. *Id.* at 139. Based on the examination, Dr. Irwin concluded:

X-rays of the lumbar spine are being obtained and that report will be appended. Although this claimant alleges profound functional impairment, I find nothing on examination to really support this degree of incapacity. While not denying he has some pain, this does not seem to be manifested in the usual ways, and there's certainly no muscle spasm except when he is required to carry out bending. He has indicated his own functional impairments above, but I can really not state that these functional limitations are confirmed by his physical findings at the present time.

³ The Administrative Law Judge also concluded that the plaintiff's allegations were "not credible to anywhere near the extent alleged." Record p. 23. This court found the Administrative Law Judge's evaluation of the plaintiff's credibility to be supported by substantial evidence. *Judkins*, slip op. at 11 (Record p. 295).

Id. at 141.

Subsequent to Dr. Irwin's examination, a radiologist, Dr. Hugh J. Caggiano, prepared a report based on x-rays of the plaintiff's lumbar spinal region. *Id.* at 142. He noted the following findings: "The lumbar vertebrae are normal in height and alignment. There is moderate narrowing at L4 5 of the disc space with associated sclerosis of the endplates and mild spondylotic lipping anteriorly. No spondylolysis is noted and the bony pedicles are intact." *Id.* Based on those findings, he concluded that the x-rays showed "marked degenerative disc disease at L4 5." *Id.*

"[T]he Administrative Law Judge ruled that the objective medical evidence failed to support [the plaintiff's] allegations of severe, functional limitation. . . . In so ruling, the Administrative Law Judge relied on both the radiologist's report and Dr. Irwin's consultative examination report." *Judkins*, slip op. at 6 (Record p. 290) (citations omitted). However, Dr. Irwin prepared his report before reviewing the radiologist's report. *Id.* at 7 (Record p. 291). This court reasoned that, "[b]ecause a full understanding of the radiologist's diagnosis is beyond the experience of a layperson, the Administrative Law Judge should have sought further medical evidence concerning its impact on the plaintiff's allegations of pain. . . . In the absence of a medical expert, however, it was inappropriate for the Administrative Law Judge to make the medical judgment that there was no objective basis for the plaintiff's complaints of disabling pain based on the bare medical findings provided in the radiologist's report." *Id.* at 7-8 (Record pp. 291-92). Thus, finding the determination not supported by substantial evidence, this court vacated the decision and remanded the cause. *Id.* at 11 (Record p. 295).

Second Administrative Hearing

The present appeal flows from the Commissioner's determination on remand. The Commissioner obtained expert testimony from Edward B. Babcock, M.D., a specialist in internal medicine, concerning the radiologist's report. Record pp. 220-21. The plaintiff's sole assertion of error involves Dr. Babcock's testimony about the x-ray report.

At the administrative hearing below, Dr. Babcock testified:

I'm puzzled by [the radiologist's] report. He concludes it's marked degenerative dis[c] disease at L-4 to 5 as you state, but when you read it, it doesn't sound like it's really marked. I'm not sure whether that's real or a typographical error. There was moderate narrowing of L-4 to 5 dis[c] space with associated sclerosis of the end plates and mild spondylitic lifting anteriorly. That doesn't sound like marked degenerative dis[c] disease to me.

Id. at 220. Based in part on this testimony, the Administrative Law Judge found that there was "very little objective medical evidence in the record to support [the plaintiff's] subjective complaints." *Id.* at 197. Accordingly, the Administrative Law Judge found that the plaintiff retains the residual functional capacity to perform the exertional demands of sedentary work. Finding 5, Record p. 200.

It is the Commissioner's responsibility to determine issues of credibility, to draw inferences from the evidence of record and to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). In the First Circuit, an Administrative Law Judge is not necessarily required to give more weight to a treating physician's report than to others. *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988). The weight to which medical testimony is entitled varies with the circumstances of each case, including the nature of the illness and the information provided to the expert. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 328 (1st Cir. 1990).

In these circumstances the Administrative Law Judge was not required to value the radiologist's opinion more than Dr. Babcock's. Although Dr. Babcock did not view the films

themselves, he read the radiologist's detailed description of the films. The radiologist clearly noted the degree of the abnormalities which the films revealed: "moderate" narrowing of the disc space, and "mild spondylotic lipping anteriorly." He also noted the aspects of the x-rays that were normal (lumbar vertebrae normal in height and alignment; no spondylolysis, bony pedicles intact). The Administrative Law Judge was entitled to accept Dr. Babcock's opinion that, based on the findings the radiologist described, the plaintiff did not suffer from "marked" degenerative disc disease.

The Commissioner has cured the sole error that prompted this court to vacate her prior decision. As a layperson, the Administrative Law Judge was not qualified to presume that the radiologist's diagnosis would not have had a detracting impact on Dr. Irwin's diagnosis. *Judkins*, slip op. at 7 (Record p. 291). Dr. Babcock, however, provided expert testimony rejecting the radiologist's diagnosis of marked degenerative disc disorder. Crediting Dr. Babcock's testimony, the Administrative Law Judge found that the objective medical evidence did not support the plaintiff's complaints of pain. Because this determination is supported by substantial evidence, I recommend that the Commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 29th day of March, 1996.

David M. Cohen
United States Magistrate Judge